documents. According to Mr. Garland, the Arbitrator found on a balance of probabilities that there was an oral variation requiring this better finish. If there was such an oral request to provide a better finish than was required by the sub-contract, the Claimants should be paid for this extra work.

In reply, Mr. Gardam for the Respondents said that the Claimants in their letter dated April 15, 1974 proposed that a new rate should be agreed upon for additional work in the event the quantity of armouring stone works exceeded 10,000 cubic metres. The Claimants did not ask for extra payment for the work required to place Class A stones evenly as agreed upon in the Respondents' letter of November 24, 1973 which forms part of the main contract. The Claimants' letter dated July 8, 1977 claiming for extra payment for placing Class A stones evenly did not set out any ground in support of their claim. There was no evidence of any oral variation of the sub-contract. In any case, Part III of the sub-contract only dealt with variations ordered in writing by the contractor or confirmed in writing to the sub-contractor by the contractor and it was not disputed there was no variation order in writing in this connection.

In my view, the Claimants are not entitled to be paid any additional sum for the extra work they carried out to change the facing stones of the stone bund with armouring stones because there is no evidence of any variation order, oral or in writing in connection therewith.

In the above premises, my answer to Question 6 is that on a proper construction of the provisions of the sub-contract the Claimants are precluded from recovering the sum of $149,477.61.

Accordingly, I order that judgment be entered for the Plaintiffs/Claimants in the sums of $1,646,010.01 for the supply and placing of Class A and B stones, of $160,386.10 for the placing of filter cloth and of $261,875.95 in respect of the cost of filter cloth.

The Claimants to get 70% of the taxed costs of the Arbitration proceedings as well as of this application. Costs for two counsel allowed in the hearing of this application.

Order accordingly.

Solicitors: *Yap & Yap; Donaldson & Burkinshaw.*

MALAYSIAN REPORTS

YAP YOKE LUAN & ORS. v. ONG WEE TOK & ORS.

[F.C. (Salleh Abas C.J., George Seah & Syed Agil Barakbah F.JJ.) August 25 & October 19, 1983] [Kuala Lumpur – Federal Court Civil Appeal No. 284 of 1982]

Contract – Purchase of land belonging to estate of deceased person – Sale subject to leave of court – Objection by beneficiaries – Leave not given – Delay in application to court

Probate and Administration – Sale of land belonging to estate of deceased person – Sale subject to leave of court – Objection by beneficiaries – Leave not given

In this case the first and second respondents, as the administrators of the estate of a deceased person, had agreed to sell land belonging to the estate to the appellants. The sale was subject to obtaining leave of the court. The administrators delayed in applying for leave, but in the meantime the appellants were allowed vacant possession of the land. The appellants subsequently obtained an order from the High Court ordering the administrators to apply to the court for leave to sell and transfer the land. The administrators therefore filed an application to court for leave. The beneficiaries were cited as respondents and the appellants applied to be added as interveners. The application was dismissed by the learned judge as the beneficiaries opposed the application on the grounds *inter alia* that the agreed purchase price was grossly below the market value. The appellants appealed.

Held: (1) the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the court before it could be carried into effect and they had taken the risk of losing their bargain if the court refused to grant such approval;

(2) the duty of the court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the court will have to look into the facts and surrounding circumstances of the case, that is whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The court is concerned that the price is a reasonable one not at the time the offer was made but at the time of the hearing of the application for approval of the proposed sale;

(3) in this case the purchase consideration was manifestly low in the light of the valuation of the land at the material time and the learned judge was correct in dismissing the applications;

(4) in this case the appellants had delayed in their application to court for relief and there was no reasonable excuse for them to have been inactive for such a long period without seeking relief.

Cases referred to:

(1) *Che Ah and Che Yang Kelsom* v. *Che Ahmad* [1941] M.L.J. 126.
(2) *Buttle* v. *Saunders* [1950] 2 All E.R. 193, 195.
(3) *Tunku Ismail bin Tunku Mohamed Jewa and Anor.* v. *Tunku Baharom bin Tunku Mohamed Jewa & Ors.* [1982] 2 M.L.J. 44, 45.
(4) *Gan Hong Hoe* v. *Aziz Beg* [1954] M.L.J. 202
(5) *Amalgamated Investment & Property Co. Ltd. (in liquidation)* v. *Texas Commerce International Bank Ltd.* [1981] 1 All E.R. 923.

FEDERAL COURT.

K. Anantham for the appellants.

K.C. Loke for the 1st & 2nd respondents.

K.L. Chong for 4th, 5th and 6th respondents.

M.C. Choong for 3rd, 9th, 11th & 12th respondents.

Cur. Adv. Vult.

Syed Agil Barakbah F.J. (delivering the judgment of the Court): This case involves the purchase of land belonging to the estate of Ong Sing Keng who died intestate (hereinafter called "the deceased"). The first and second respondents are the administrators having been granted letters of Administration on November 23, 1946 and extracted on July 9, 1947 vide Petition No. 105 of 1946. The twelve beneficiaries to the estate are the third to the fourteenth respondents. The estate comprises of two adjoining lots totalling slightly over 122 acres of which about 40 acres are under rubber and the rest being vacant land. It was registered in the name of the deceased under Pahang Certificates of Title Nos. 348 and 349 for lots Nos. 842 and 843 both situated in the Mukim of Triang (hereinafter referred to as "the said land"). On March 15, 1973 the administrators executed a written agreement for the sale of the said land with the appellants who agreed to purchase it free from all encumbrances subject to Court approval as specified in clause 2 of the agreement. Under clause 3 the administrators in their capacity as the vendors undertook to apply to the relevant High Court for leave to sell and transfer the said land to the appellants not later than 180 days from the date of the execution of the agreement. On the execution of the agreement the appellants paid the sum of $45,000.00 by way of deposit and the receipt thereof was acknowledged by the administrators. It was also agreed vide clause 6 that in the event that leave of Court was not obtained the administrators would refund the said deposit.

There was no dispute that the administrators failed to apply for leave as undertaken by them in Clause 2. The reason as stated in their affidavit dated December 8, 1981 (page 8 of the Appeal Record) was because they could not obtain the consent from all the beneficiaries and prior to and at the time of signing the agreement they had only consulted and obtained the consent of only four of the beneficiaries. Subsequently three of them withdraw thus leaving only one who consented. As a result of their inaction the appellants filed Civil Suit No. 847 of 1975 against the administrators and on December 4, 1981 obtained an order from the High Court, Kuala Lumpur ordering the administrators to apply to the relevant High Court for leave to sell and transfer the said land within 14 days from the date of the order failing which the appellants were empowered to apply on their behalf. In compliance with the said order the administrators filed Originating Summons No. 135 of 1981 in the High Court Seremban on December 10, 1981. The beneficiaries were cited as the respondents. Subsequently the appellants on March 1, 1982 successfully applied to be added as the interveners in the originating summons. The summons was heard by the learned judge who dismissed the application with costs. The appellants being dissatisfied with the said decision have now appealed to this Court.

It should be noted that even though the agreement was conditional upon leave of Court being obtained the respondents were allowed vacant possession of the said land on the execution of the agreement (clause 13). They cleared the land for the purpose of housing development and also lodged a caveat. They were also responsible for the payment of quit rents for the year 1973 vide clause 7 and continued to pay the same for the following years as they remained in occupation of the said land. The appellants claimed to have expended $7,615.40 in the payments of quit rents and assessments up to the year 1981. They conceded however of having the rubber tapped and earning some income but had to stop on finding it was uneconomical due to the trees being old. No mention was made as to the period that the rubber was tapped and as to the income derived therefrom.

The beneficiaries on the other hand filed affidavits opposing the application for leave to sell the said land to the appellants pursuant to the said agreement. The main grounds are firstly, that none of them were consulted nor their consent obtained prior to the purported sale. Secondly, the purchase piece of $150,000.00 as agreed upon between the appellants and the administrators was grossly below its fair market value at the material

time. In support thereof they filed a valuation report dated November 20, 1981, prepared by M/s. C.H. Williams, Talhar & Wong Sdn. Bhd. showing as at March, 1973, that is, at the time the purported sale agreement was executed, the value of the said land was $244,000.00. The appellants did not challenge the valuation price but submitted through counsel that the valuation report contains comparison of sales of fairly small areas of adjacent lands worth about $40,000.00 each. They had paid a much higher price for the said land including a deposit of 30% of the purchase price well in March, 1973. They had incurred expenses in clearing the land and in paying the quit rents and assessments and therefore it was unconscionable for the beneficiaries to oppose the application.

In this regard we are of the view that the appellants as the proposed purchasers under a conditional contract were perfectly well aware that their contract had to be approved by the Court before it could be carried into effect and they had taken the risk of losing their bargain if the Court refused to grant such approval. The duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price. The Court is concerned that the price is a reasonable one not at the time the offer was made but at the time of hearing the application for approval of the proposed sale. (*Che Ah and Che Yang Kelsom* v. *Che Ahmad*[1] and *Buttle* v. *Saunders*[2] and *Tunku Ismail bin Tunku Mohamed Jewa and Anor.* v. *Tunku Baharom bin Tunku Mohamed Jewa & Ors.*[3]). We agree with respect with the learned judge that the purchase consideration of $150,000.00 was manifestly low in the light of the valuation of the market value of $244,000.00 for the said land at the material time. It was apparent that the administrators had failed to carry out their duty as trustees to obtain the best possible price. Since most of the beneficiaries had not been consulted nor their consent been obtained, the administrators should have applied the common-sense rule of calling for a valuation report. That would have assisted them in considering whether the purchase consideration they had agreed upon was reasonable as the best possible price. No doubt there was no higher offer at the material time but in our opinion, they have not exercised due prudence in the interests of the estate by executing the contract for such a low consideration without consulting and obtaining the consent of the beneficiaries. Apart from that they went further in allowing the appellants to take possession of the said land, reap the benefit from the sales of rubber and clear the land for the purpose of a housing project. The fact that the appellants have paid 30% deposit and incurred expenses while in occupation of the said land may be a matter for consideration by the Court but that cannot and does not override the duty of the Court to see that the estate benefits as much as possible. The *ratio decidendi in Gan Hong Hoe* v. *Aziz Beg*[4] has no application and is easily distinguishable. In that case there was no question whether the purchase consideration was unreasonable and the beneficiaries did not oppose the conditional sale. The purchaser having occupied the land and the house thereon was held not to be entitled to specific performance of the contract but was awarded damages for breach of contact. The well-accepted principle in *Che Ah & Che Yang Kelsom's case* did not appear to have been cited. We feel that had that been brought to the attention of the learned judge, his decision would have been different.

The next important issue relates to the delay by the administrators to apply for leave of the Court during the period as specified in clause 2. There appears to be a delay of about seven years until the date of the proceeding. About two years after the execution of the agreement the appellants filed Civil Suit No. 847 of 1975 against the respondents but waited more than five years to obtain a Court Order requiring the administrators to apply for leave to sell the said land. No doubt the administrators had failed to act under clause 2 on the mistaken ground as stated earlier. However there was no reasonable excuse for the appellants to have been inactive for such a long period without seeking relief under O. 80 R.H.C. much earlier. It would seem that they were content to lie low without taking any step whatever in the belief that their occupation of the land and payment of deposit and other expenses, would strengthen their position as purchasers. Little did they realise that according to prevailing current events land values have rocketted sky high since the execution of the agreement. Faced with strong opposition from almost all the beneficiaries right from the beginning and the inaction of the administrators to comply with clause 2 of the agreement, they failed to comprehend that their task in convincing the Court that the purchase consideration of

$150,000.00 was favourable to the beneficiaries, was rendered difficult.

We do not agree with the submission that the agreement has already lapsed in view of the proviso in clause 2 which reads: –

"... PROVIDED THAT should the said Order approving the sale and transfer of the said lands be delayed, this Agreement shall still be in force."

We read the order as referring to delay by the Court in approving the sale and transfer and not delay by any of the parties to the agreement. However in the absence of arguments on the legality or otherwise of the proviso, we feel justified in concluding as the learned judge has done, that the appellants are also responsible for the inordinate delay and have themselves to blame for it.

Further, the doctrine of equitable estoppel as propounded in *Amalgamated Investment & Property Co. Ltd (in liquidation)* v. *Texas Commerce International Bank Ltd.*[5] does not apply. This is not a case where the administrators had stood by and allowed the appellants to incur expenditure in clearing the said land and paying quit rents and assessments or otherwise to act in the mistaken belief as to their rights over the said land, in view of the fact that it was well within their knowledge that the sale was subject to the approval of the Court as expressly provided in clause 1 of the agreement. Nor can it be said that the appellants had been influenced by any representation or encouragement on the part of the administrators into taking possession of the land and incurring such expenditure.

The appellants have now made a counter-offer by increasing the purchase consideration to $250,000.00, a sum slightly above the price quoted in the valuation report in 1973. Since then according to the submission of the learned counsel for the respondents, the price of the said land has increased tremendously to about $3,000,000.00 and the beneficiaries are prepared to purchase the said land at a reasonable price. No doubt there was no proper valuation of the land as at the date of hearing of the application and the beneficiaries had not made any quotation of their offer. Be that as it may, there is no reason to doubt that the value of the said land is very much more than that in 1973. The appellants' counter-offer is thereby rendered unreasonable and unfavourable to the estate as a whole.

For the reasons stated above we dismiss the appeal. There is to be no order as to costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; K.C. Loke & Co.; Sheikh Salim, Wong & Co.; Philip Choong & Co.*

SETALI DEVELOPMENT SDN. BHD. & ANOR. v. LIM YOU KENG

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) September 10 & October 19, 1983]

[Johor Bahru – Federal Court Civil Appeal No. 72 of 1982]

Practice & Procedure – Appeal – Application to have appeal dismissed – Application in Chambers adjourned to open court – Order made in open court – Leave for appeal not required – Whether notice of appeal filed within time – Computation of period of one month – Interpretation Act, 1967, s. 54(1)(a) – Rules of the Federal Court 1980, r. 56 – Courts of Judicature Act, 1964, s. 68(2).

In this case the appellants had filed notice of appeal against a mandatory injunction granted by the learned Judicial Commissioner, Muar. The respondents applied for an order that the appeal be dismissed on the grounds that the appellants had failed to comply with provisions of section 68(2) of the Courts of Judicature Act, 1964 and Rule 56 of the Rules of the Federal Court, 1980. It was alleged (1) that the application for leave to appeal had not been served on the respondent or his solicitors and (2) that the notice of appeal was filed out of time.

Held: (1) as the case had been ordered to be heard in open court and the order expressly stated that it was an order made in open court no leave for appeal was required under section 68(2) of the Courts of Judicature Act, 1964;

(2) since the order appealed against was made on February 28, 1982 the period of one month under rule 56 of the Rules of the Federal Court, 1980 runs from March 1, 1982 (the day when the order was made being excluded under section 54(1)(a) of the Interpretation Act, 1967). The "month" means the calendar month ending on the same date as it commenced on the previous month and therefore since the order was made on February 28, 1982 the notice of appeal in this case filed on March 29, 1982 was well within time.

Cases referred to:

(1) *T.O. Thomas* v. *K.C.I. Reddy & Anor* [1974] 2 M.L.J. 87.

(2) *Migotti* v. *Colvill* (1879) 4 C.P.D. 233.

(3) *Marren* v. *Dawson Bentley & Co. Ltd.* [1961] 2 All E.R. 270.

FEDERAL COURT.

S.C. Loh for the appellants.

Karpal Singh for the respondent.

Cur. Adv. Vult.